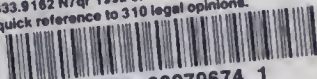


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# A Quick Reference to 310 Legal Opinions



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MONTANA DEPARTMENT OF NATURAL  
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September 1992

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# ABBREVIATIONS

404	Section 404 of the federal Clean Water Act, which prohibits the discharge of dredged or fill material into waters of the United States
CD	Conservation District
DFWP	Montana Department of Fish, Wildlife and Parks
DNRC	Montana Department of Natural Resources and Conservation
DSL	Montana Department of State Lands
HB 661	House Bill 661, an amendment to the Natural Streambed and Land Preservation Act, enacted in 1988
MACD	Montana Association of Conservation Districts
MEPA	Montana Environmental Policy Act
NSLPA	Natural Streambed and Land Preservation Act
OGC	Office of the General Counsel of the U.S. Department of Agriculture
RCM	<i>Revised Codes of Montana</i> (now called <i>Montana Code Annotated</i> )
SB 310	Senate Bill 310, the Montana Natural Streambed and Land Preservation Act
SCS	Soil Conservation Service of the U.S. Department of Agriculture
USDA	U.S. Department of Agriculture
USFS	Forest Service of the U.S. Department of Agriculture

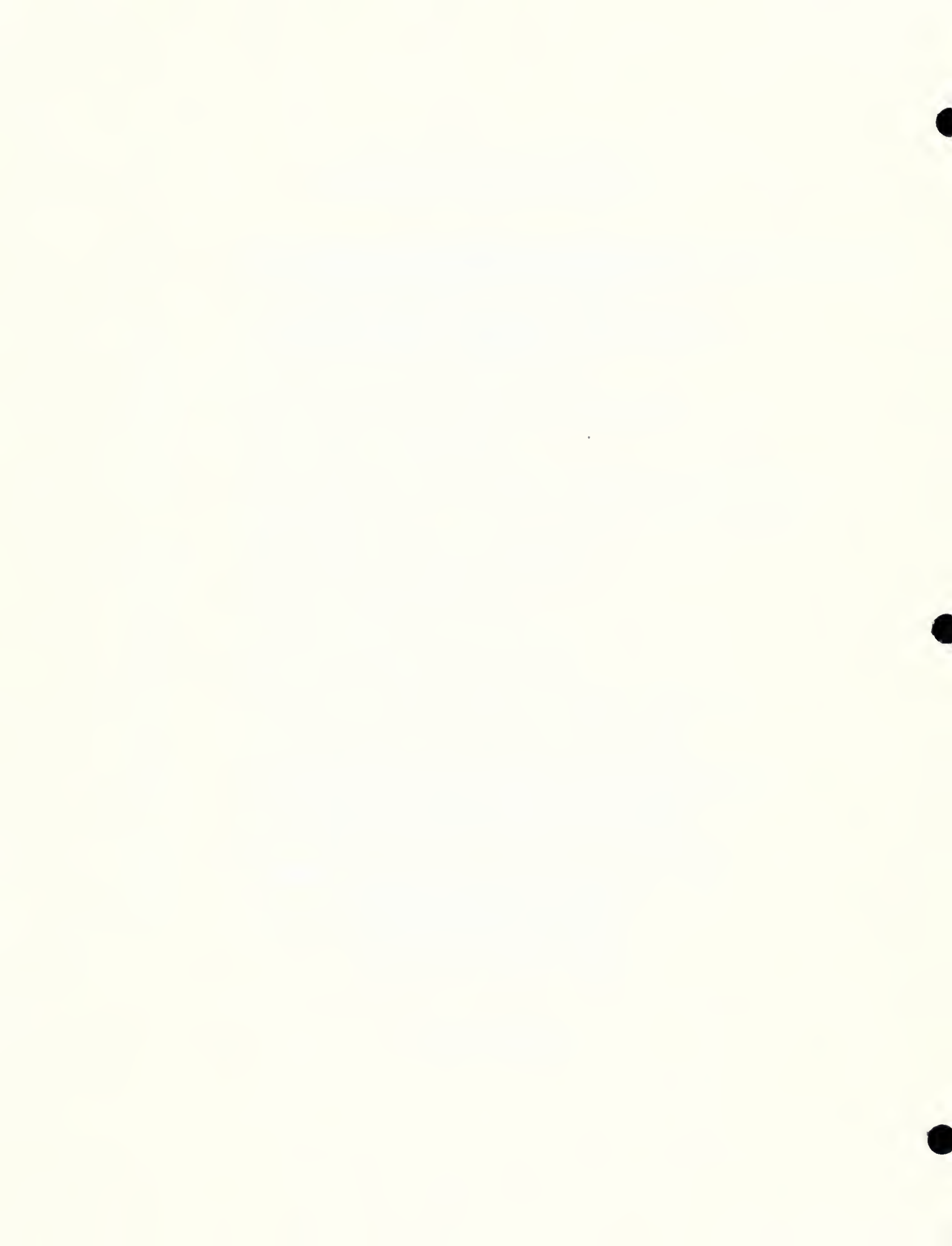
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MONTANA DEPARTMENT OF NATURAL  
RESOURCES AND CONSERVATION

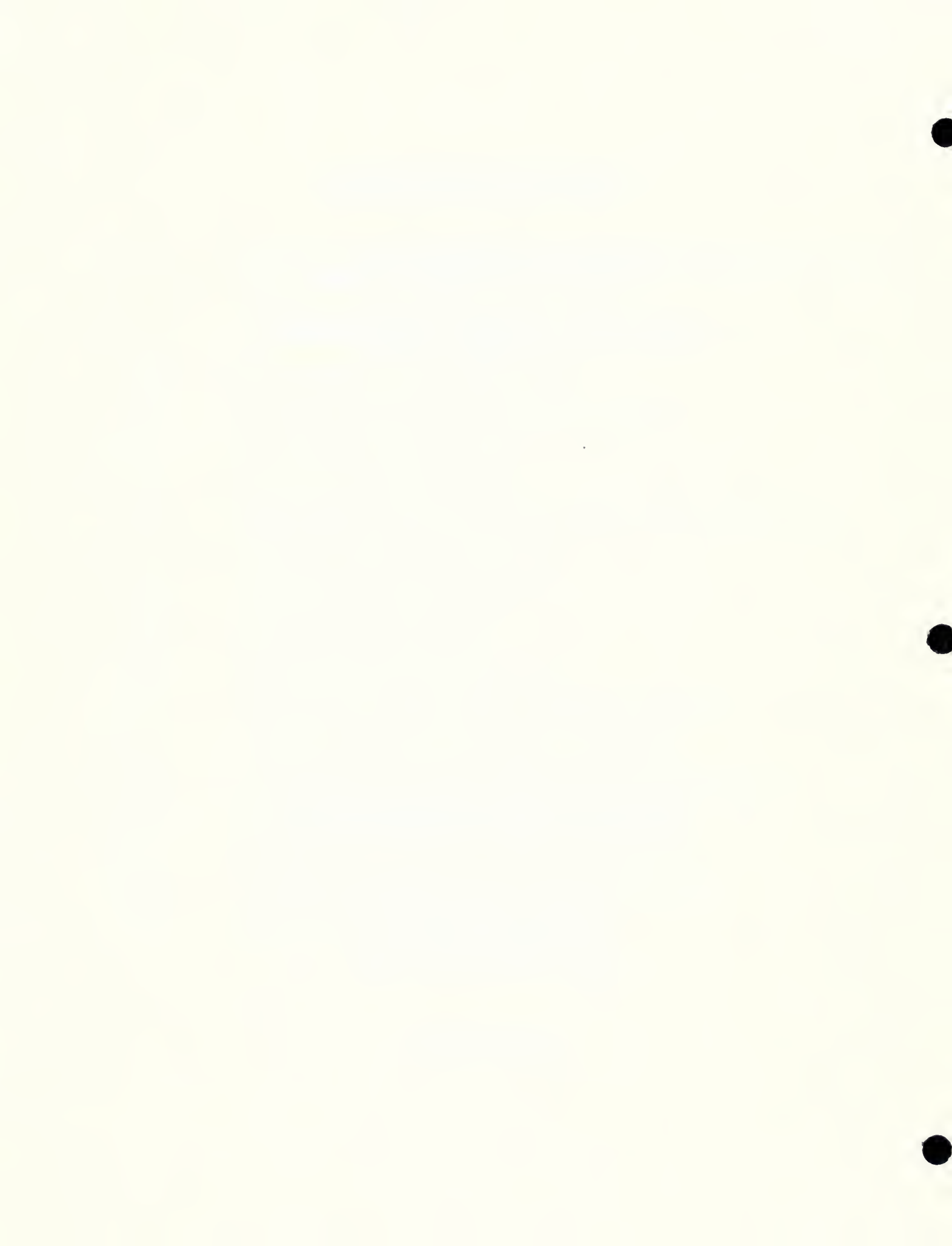
Conservation and Resource Development Division  
Conservation Districts Bureau  
1520 East Sixth Avenue  
Helena, Montana 59620-2301

September 1992



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# INTRODUCTION

The Natural Streambed and Land Preservation Act — SB 310 — became law in 1975 and has since been amended several times, including the addition of a provision (in HB 661) for an annual plan of operation. From the beginning, advice has been needed from lawyers and others regarding which projects and lands are covered, what certain expressions mean, how conservation districts (CDs) can best fulfill their responsibilities, etc.

The written answers to those questions have been condensed and compiled here into a reference for CD supervisors and others working with SB 310. Each of the 75 opinions has been assigned a number, according to the chronological order in which it was issued. Information about each opinion's origin can be found under its number in Appendix A.

If several opinions have come out on the same subject, they have been grouped here to make this book more useful. For example, over the years half a dozen opinions have been sought regarding "perennial streams." Look under the section with that title, and you will find the six opinions listed in the order in which they were issued.

Most of the opinions are quoted verbatim. Some have been reworded slightly, to recast them in a question-and-answer format, or to add clarity to a conclusion seen here out of context. Whenever a conclusion is not quoted verbatim, an effort has been made to be faithful to the original language and meaning.

The law evolves over time as it becomes better defined. In defining a "perennial stream," for example, part of the conclusion of Opinion 11 (written by a lawyer in 1978) says:

*A "natural perennial flowing stream" means a stream that, in its natural state, historically flows continuously at all seasons of the year and during dry as well as wet years. (Emphasis added)*

Opinion 42 (written by a lawyer in 1985) says:

*A stream that in its natural state dries up in drought years may still qualify as a "perennial" stream for purposes of SB 310. A flow that is "historically" continuous may be construed as one that, considered over a period of years, generally (rather than always) flows continuously; or one that, in most years, flows at all seasons. (Emphasis added)*

Opinions 11 and 42 appear to be contradictory. By defining "historically continuous flow," Opinion 42 supports a more flexible interpretation of the "continuously flowing" requirement, consistent with the broad purposes of the Natural Streambed and Land Preservation Act. In such cases, be guided by the most recent opinion. It should be considered the most relevant and reliable.

This reference should be used only as a guide to request complete copies of relevant opinions; it is not a detailed discussion. To get a copy of any complete opinion, contact the Conservation Districts Bureau, Montana Department of Natural Resources and Conservation, 1520 East Sixth Avenue, Helena, MT 59620-2301, or call 406 444-6667. Ask for the opinion by its number.



# MAJOR ISSUES

## ACCESS ACROSS PRIVATE LAND

12. Q: May a representative of the conservation district enter onto private land to determine whether there is a violation of the 310 law?
- A: Since the district is required by statute to enforce the provisions of the 310 law, its representatives may enter onto private land to do so. However, where the landowner refuses to let a representative of the district inspect for violations, it will be necessary to obtain a search warrant. The requirements for such a search warrant would be: (1) that "probable cause" must exist, and (2) that the search be "reasonable."
51. Q1: Does a district have the authority to issue a 310 permit to a downstream water user for repairs at his point of diversion, which is upon another's private property?
- A1: The district has jurisdiction over the project on the perennial stream, although it can make no determination regarding access across private property. However, the downstream water user has the authority under 85-2-414, MCA, to conduct water from or over the land of another for any beneficial use. The board of supervisors should recognize the right of the project applicant to enter onto the land for the repair.
54. Q1: Who should sign the application for a 310 permit?
- A1: The 310 law itself does not require the landowner to sign or cosign a permit application. It follows that the district is not legally obligated to make sure that an applicant has the owner's permission to start work on a project. While the district is not legally obligated to obtain a landowner's signature on a SB 310 application, the district does have the discretion to require it when it seems useful.
- Q2: Does the 310 permit authorize a project without the landowner's approval?
- A2: Obtaining authorization and access from the owner is solely the responsibility of the applicant. District approval of a project should not be construed as giving the applicant the right of access to the project site.
70. Q: Does a 310 permit require landowner permission?
- A: It is not the obligation of the conservation district to interpret easement or land ownership issues in granting or denying an application. Pursuant to the 310 law, the conservation district has a duty to proceed with the processing of the application.

## ANNUAL PRACTICE/MAINTENANCE OF STRUCTURES

48. Q: Does the 310 law require an irrigator to apply for a 310 permit before machinery is used to maintain or improve an earthen diversion dam?
- A: In accordance with the 310 law, an irrigator must apply for a 310 permit before altering a stream channel to divert water.

55. Q: What is the meaning of the phrase, *historic maintenance*, as it appears in Section 75-7-103(5)(b), MCA?

A: The construction of a diversion dike with heavy equipment requires either a permit or an approved plan of annual operation (HB 661) under the 310 law. Large-scale diversion works that significantly alter the streambed require the submittal and approval of an annual plan of operation. Diversion work that alters the streambed and is conducted in the absence of an approved annual plan of operation constitutes a project that requires a 310 permit. When this work is performed within a designated floodplain or floodway, the construction additionally requires a permit from the responsible political subdivision.

The broader question of the meaning of *historic maintenance* is not easily answered. The determination of what maintenance would qualify for management by an operation plan is best made on a case-by-case basis by the local conservation district.

58. Q: How does HB 661, which amended the 310 law, redefine the term *project*?

A: (a) "*Project*" means a physical alteration or modification of a stream in the state of Montana which results in a change in the state of the stream in contravention of 75-7-102.

(b) *Project* does not include customary and historic maintenance and repair of existing irrigation facilities:

(i) that do not significantly alter or modify the stream in contravention of 75-7-102; or

(ii) for which a plan of annual operation has been submitted to and approved by the district. The plan is subject to future review and approval by the district at its option. Any modification to the plan must have prior approval of the district.

The process for approval of an annual plan of operation is the same as the 310 permit process for review of a project.

72. Q: How should HB 661 be implemented?

A: Montana Code Annotated 75-7-103(5) provides that:

(b) *Project* does not include customary and historic maintenance and repair of existing irrigation facilities:

(i) that do not significantly alter or modify the stream in contravention of 75-7-102 (Emphasis added)

The interpretation of *significantly* in the context of the 310 law is not a question of law. Rather, it is a question of fact to be determined on a case-by-case basis by the administrators of the 310 permit system. In the absence of an agreement or rules, the district should not make decisions on 661 exemptions without consulting DFWP.

## DOCKS, MARINAS, AND WHARVES

56. Q: Does the 310 law apply to boat docks?

A: The 310 law gives the district authority over boat docks only if they are on a river or stream or its immediate banks, and only insofar as the construction of the dock is a *project*, as defined by Section 75-7-103(5), MCA. District regulation of boat docks under the 310 law must be oriented toward erosion and sedimentation concerns, such as placement, length, and construction methods. The 310 law does not give the district authority to specify what type of structure may be built atop a boat dock.



60. Q: Would the 310 law apply to all or any portion of a marina development?

A: The policy of the 310 law is that Montana's:

*natural rivers and streams and the lands and property immediately adjacent to them within the state are to be protected and preserved to be available in their natural or existing state and to prohibit unauthorized projects and in so doing to keep soil erosion and sedimentation to a minimum, except as may be necessary and appropriate after due consideration of all factors involved. (75-7-102, MCA, emphasis added)*

It is clear from the above quoted policy that the legislature intended that the conservation district supervisors have the ability to look at all of the relevant facts affecting any development in the bed and banks of natural rivers and streams before authorizing a development. Although the supervisors do not have jurisdiction to permit the entire channelization project, they do have the responsibility to review the entire project as it may affect that portion of the project that is a 310 project.

62. Q: Does Section 85-16-101, MCA, granting an individual a permit to build wharves and docks upon lands under water belonging to the state, exempt that individual from the 310 permit?

A: The 310 permit is required if the immediate banks or bed are disturbed.

75. Q: Should secondary impacts to the stream be a consideration in issuing a 310 permit?

A: In the situation where a boat dock is being constructed under the 310 law, the local conservation district has no legal obligation to consider the impacts on the stream from the potential commercial use of the dock. For example, the potential impacts that may occur from the operation of boats using a dock are not impacts that are to be considered in the determination of whether the conservation district should grant or deny a 310 permit for the construction of the dock.

## EMERGENCIES

21. Q: What exclusions exist under the emergency provisions of the 310 law?

A: Two requirements must be met in order to come within the exclusion: (1) the action is necessary to safeguard life or property, and (2) the action is taken during periods of emergency. The answer to each of the requirements would be based on the facts of the situation.

The person who engages in the emergency activity does so at his or her own risk. If the activity is later found not to comply with the emergency provisions, then that person would be in violation of the law and subject to its sanctions.

25. Q: When do the emergency provisions of the 310 law apply?

A: Section 75-7-113, MCA, provides that a permit is not necessary when the action is "necessary to safeguard life or property, including growing crops, during periods of emergency." As an example, there could be flooding and high water in May, causing considerable damage. Any work done during this time would probably come within the emergency provisions of the law. Let's suppose the water then recedes and by the middle of June is well within the banks and receding every day. Applying the emergency provisions when it is very clear that the stream is no longer posing any threat to life or property could be interpreted as a deliberate effort to circumvent the law.

33. Q: Is Exxon's dredging the Yellowstone around its pump intake facilities exempt as an emergency?  
 A: Exxon is not entitled to claim that its actions are subject to the emergency exceptions in the law, when no emergency now exists. The effect of sediment accumulation on Exxon's diversion facilities is fully predictable.
37. Q: Is the removal of beaver dams, excluded as "debris removal," extended to those situations where there is potential damage to property?  
 A: It appears from the statutes that, if there is a potential threat to public health or potential damage to property, Fish, Wildlife and Parks is in a position to act to protect the health and property of those people affected (87-1-224 and 225, MCA). Additionally, Rule 13 of the 310 law model rules provides for certain emergency provisions that would cover the situation.
71. Q: Can emergency provisions be used more than once in a 5-year period?  
 A: Section 75-7-113 (4), MCA, states:

*If the same or a similar emergency occurs to the same applicant more than once within a 5-year period, the supervisors shall request the team members to include in their reports a determination of the validity of the emergency action and to ascertain the feasibility of a more permanent solution to the emergency. (Emphasis added)*

The emphasized language creates a duty on the supervisors to have the team members review the facts incident to the continued emergency.

## ENFORCEMENT

14. Q: Does the State of Montana have authority to enforce the Natural Streambed and Land Preservation Act?  
 A: The act as enforced and administered is a proper and reasonable exercise of the police power when its purposes are balanced against the benefits to water quality, riparian area protection, and the health and well-being of others. Nor would the act as applied constitute a taking of private properties.
39. Q: Are CDs required to administer the 310 law?  
 A: The conservation district is responsible for enforcement of the 310 law. Purposeful or negligent failure to carry out the mandate of the law subjects the district supervisors to both criminal and civil liability.
53. Q: What enforcement discretion does the district have for the inspection of approved projects?  
 A: The rules implementing the 310 law for the inspection of approved projects state:

*The supervisors or their designated representative may inspect any project during or after construction to ensure that proper construction practices are being employed and to provide technical assistance to the applicant. The district shall notify the landowner prior to entering land to inspect a project, either orally or in writing. (Emphasis added)*

The districts should have a policing mechanism for the inspection of approved projects. This is not to say, however, that all projects must be inspected. Upon inspection the district may make reasonable determinations as to whether the district should enforce its approval as originally issued. As long as these decisions are made in accordance with established principles of justice and not arbitrarily and capriciously made, then there is little likelihood that the districts would be liable for enforcing the 310 law on a case-by-case basis.



## FEDERAL, STATE, AND INDIAN LANDS

3. Q: Does the 310 law apply to projects on state or federal lands?  
A: Projects conducted by a state agency on state land fall under the original streambed law administered by the Department of Fish, Wildlife and Parks. Projects conducted by a private person or entity on state or federal lands are covered by the 310 law. Regarding projects conducted by a federal agency on federal land, the question should be answered by the Montana attorney general (see no. 8 below).
6. Q: Does the 310 law apply to projects on state forest lands?  
A: Projects not conducted by or for a state agency, but solely by or for a private individual or entity, are covered by the 310 law.
8. Q: Does the 310 law apply to projects constructed on state, federal, or Indian reservation land?  
A: Indian reservation land  
The act applies to non-Indian projects on non-Indian lands within Indian reservations to the extent that the act does not conflict with tribal self-government. But the act does not apply to Indian projects within Indian reservations.  
State land  
The act applies to private projects on state lands, but does not apply to state projects on state lands.  
Federal land  
The act applies to non-federal projects on federal lands unless a specific act of Congress preempts state regulation. But the act does not apply to the federal government either on or off federal lands unless Congress consents to such regulation.
30. Q: Do conservation districts have the authority to enforce the 310 law on Forest Service land?  
A: Conservation districts do have authority to issue or deny 310 permits on streams where they run through Forest Service land. Forest Service regulations provide for this, requiring compliance with state environmental protection laws as a condition for Forest Service special use permits.
36. Q: Is a Department of State Lands easement needed for irrigation structures on navigable rivers?  
A: An easement or a temporary license is needed any time a structure is placed on or an activity takes place below the low water mark on the beds of a navigable river. Streambeds are treated like any other piece of state land: any time that an activity takes place on that land, it must be authorized, or it constitutes trespass. The easement can be acquired by contacting the nearest field office of the Department of State Lands.
44. Q: What is the relationship of the 1872 Federal Mining Law to the 310 law? Does the 310 law conflict with a miner's statutory right to discover and develop mineral deposits on federal lands?  
A: The 310 law is not preempted by the General Mining Law of 1872. State mining regulations designed to safeguard the environment are in harmony with express congressional policies.
46. Q: Are there problems with the working agreement between Lake CD and the Salish and Kootenai Tribes?  
A: The purpose of the agreement is to jointly administer the tribes' and the district's shared objective of streambed preservation. However, there are legal problems with both the district's creation of a quasi-judicial joint board, and the district's agreement to be bound, in issuing permits, by the decisions of a third party.

Additionally, any agreement between a state political subdivision and a tribal government must be in compliance with the State-Tribal Cooperation Agreements Act, 18-11-101 et seq., MCA. This act, among other things, requires that the agreement be approved in advance by the attorney general of Montana.

49. Q: What does the Forest Service believe its responsibilities are regarding Montana's stream preservation laws?

A: The Montana 310 law (75-7-101 et seq.) is not applicable to Forest Service lands. However, the Forest Service has entered into a "Memorandum of Understanding" with the Montana Department of Fish, Wildlife and Parks that will be applicable to all projects on National Forest lands that involve stream alteration. Consequently, under the voluntary terms of this agreement, our permit holders are required to apply for and receive approval of projects that may result in stream alteration on National Forest lands from DFWP.

52. Q1: Does the 310 law apply to projects on Forest Service land?

A1: A Montana attorney general opinion (37 Op. Att'y Gen. 15—see no. 8 on page 7) held that the location of a non-federal project on federal land alone does not preempt state regulations under the 310 law. The attorney general noted in his holding that, if there is a federal law with which the 310 law conflicts, then state regulation must give way.

The Office of General Counsel (OGC) of the U.S. Department of Agriculture has issued an opinion that the 310 law was not applicable to Forest Service lands. However, until such time as the Forest Service or OGC documents the "persuasive reasons" for preempting the 310 law, the conservation districts should follow the opinion of the Montana attorney general.

Q2: May a conservation district enter into a memorandum of understanding (MOU) with the Forest Service?

A2: Conservation districts may enter into memorandums of understanding whereby they work in conjunction with the Forest Service so that they do not duplicate each other's efforts, but rather supplement the work of one another in issuing the necessary federal and state permits. The conservation district may not waive its jurisdiction if the Forest Service has a similar permitting process.

57. Q: Does the 310 law apply to projects on Forest Service lands?

A: The pragmatic solution is to work toward the development of MOUs and put aside the legal issue of who has jurisdiction.

67. Q: What are your comments on the draft MOU proposed by the Forest Service for coordinating concurrent Forest Service/conservation district jurisdiction over perennial flowing streams on federal lands?

A: This response provides review and comments on the proposed MOU.

## JURISDICTION

1. Q1: Does the 310 law apply to projects that cause damage to a stream but were installed before the law was passed?

A1: The law applies only to projects constructed from and after the effective date of the rules adopted by the local conservation district. The law would apply only to additions or repairs to that project.



10. Q: Do county commissioners have jurisdiction over streambeds or lakes other than as provided in the 310 law?

A: There are numerous grants of power to county commissioners by the state legislature, the most direct of which are found in the:

- Lake Protection Act, Sec. 75-7-201 et seq., MCA
- Bridges, Sec. 7-14-2204(1)(2), MCA, and Sec. 7-14-2203, MCA
- Docks and Wharfs, Sec. 7-14-2823, MCA
- Eminent Domain, Sec. 70-30-102, MCA
- Flood Control, Sec. 76-5-1101 et seq., MCA

It would be difficult to provide an exhaustive list of each mention in the code of county commissioners' jurisdiction over lakebeds and streambeds.

22. Q: Does the 310 law apply to the stream bank?

A: The supervisors have authority over the immediate bank of a stream, which in the rules is defined as the area within the mean high-water mark. When a diversion is proposed, it appears that the district would have some control over the diversion to a reasonable distance from the stream.

23. Q: Does the conservation district have authority over the stream bank?

A: The conservation district has the authority to regulate activity within the mean high-water mark on both sides of a stream and the immediate banks. The immediate banks would in almost every instance include the area encompassing the mean high-water mark and then some. The immediate banks would include a reasonable distance from the stream, depending upon the topography of the site.

26. Q2: Does the 310 law apply to restriction of downstream flow as a result of a fence or other structure placed across a streambed?

A2: If the placing of a fence or other structure does not in and of itself constitute a physical alteration or modification of a stream, then no 310 approval is required. However, if the intent of the owner when building the fence or other obstruction is to catch debris, or if the owner maintains the obstruction in such a manner as to manifest such an intent, then the activity may be construed as a project.

28. Q: Does the 310 law apply to flood channels?

A: If the stream is a natural perennial flowing stream, and the flood channel is at or below the level established as the mean high-water mark of the stream, the flood channel would be considered a "project area."

32. Q: Who has jurisdiction over areas not included within a conservation district?

A: In an area not within or a part of any conservation district, the board of county commissioners is the responsible agency for enforcing the 310 law.

40. Q: Is SB 310 permitting authority concurrent with federal 404 permitting legislation?

A: In the case of the SB 310 and Section 404 permitting processes, the basic purposes of the state statute and the federal legislation are aimed at similar objectives: streambed protection and pollution control. State regulatory authority under the 310 law may be preempted by federal regulatory authority where dredge and fill activities involve the navigability of interstate waters, but only to the extent necessary to protect the dominant federal interest in navigation.

50. Q: Does the 310 law apply to excavation on the river bank above the 100-year floodplain?
- A: The 310 law applies not only to streams but also to lands immediately adjacent to them. Although this excavation (a proposed gravel pit) does not reach the river high-water mark, it is a 310 project because it is immediately adjacent to the river and could result in alteration of the river's natural or existing state.
51. Q2: Who has supervision over water distribution controversies?
- A2: Under Section 85-2-406, MCA, the district court has supervision of water distribution among all appropriators.
63. Q: Does the 310 law apply to the Clark Fork River Reclamation Demonstration Study, a government-sponsored project?
- A: A review of the information supplied indicates that both the field study and the demonstration project are being directed and controlled by governmental entities. Consequently, the activity is subject to the jurisdiction of the Department of Fish, Wildlife and Parks.
64. Q: Does the 310 law apply to state agency projects?
- A: It is clear that any project undertaken by a state or local governmental entity is not subject to the 310 law even if private contractors undertake the project for the governmental entity. These activities are regulated pursuant to the Stream Protection Act.

## PERENNIAL STREAMS

7. Q: Does the 310 law apply to an old river bed?
- A: The act and the rules thereunder apply only to natural perennial flowing streams that are actually in existence. An old river bed, in my opinion, does not constitute a natural perennial flowing stream, and therefore the act does not apply.
11. Q: What is the definition of *perennial stream*?
- A: A *natural perennial flowing stream* means a stream that, in its natural state, historically flows continuously at all seasons of the year and during dry as well as wet years. This definition would exclude intermittent streams from the 310 law but would include streams that go dry because of irrigation diversions, etc., and that otherwise would not normally go dry.
28. Q: Does the 310 law apply to flood channels?
- A: If the stream is a natural perennial flowing stream, and the flood channel is at or below the level established as the mean high-water mark of the stream, the flood channel would be considered a "project area."
42. Q: Can a stream that dries up in a drought year be considered *perennial*?
- A: A stream that in its natural state dries up in drought years may still qualify as a *perennial* stream for purposes of the 310 law. A flow that is "historically" continuous may be construed as one that, considered over a period of years, generally (rather than always) flows continuously; or one that, in most years, flows at all seasons.



73. Q: Is an overflow channel considered a part of the *stream* for purposes of the 310 law?
- A: The supervisors have jurisdiction over the "project area," which includes the streambed and banks below the "mean high-water mark" on both sides of a stream. Therefore, a channel does not need to flow water at all times in order to be within the jurisdiction of the conservation district. However, the channel must flow during times of ordinary high water. (See no. 28 on page 10.)
74. Q: Can an intermittent drainage be considered a perennial stream?
- A: The 310 law clearly applies to streams that in their natural state would fall under the requirements of the act. Water from another source added to a stream that would not otherwise in its natural state be subject to 310 jurisdiction will not make that stream subject to 310 jurisdiction.

## RESPONSIBILITY FOR COMPLYING WITH THE 310 LAW

2. Q: Does the 310 law apply to projects built with federal funds on private land?
- A: Yes, if a project is constructed at the landowner's request, is on his land, and is owned by him when the project is complete. Even though the project is funded with federal funds or sponsored by the conservation district, the private landowner is still the person engaging in the project. The landowner would apply for the 310 permit.
26. Q1: Who is responsible for making corrections after a land sale?
- A1: Any person who initiates a project without complying with the 310 law is responsible for correcting the action. The violator does not escape these sanctions by selling the property. Nevertheless, a buyer may be held responsible to cure the violation as of the day the buyer was made aware of the violation and refused to act.
26. Q3: Who has responsibility for compliance with the 310 law, the landowner or lessee?
- A3: The act provides that the *person planning to engage in a project* (75-7-111, MCA) and the *person initiating a project* (75-7-123, MCA) are responsible for compliance with the 310 law. For instance, if the lessee is acting at the request or order of the owner, the owner may be held responsible; if the lessee is acting on his or her own volition, then the lessee is responsible.
43. Q: Who is responsible for a violation, the owner, tenant, or contractor?
- A: The criminal penalties of the 310 law apply to any person engaged in altering a streambed without the consent of the district supervisors. This section is not limited to the 310 applicant, the landowner, or to persons benefited by the project. Thus, a contractor engaged in unauthorized streambed work appears to be criminally liable.
54. Q1: Who should sign the application for a 310 permit?
- A1: The 310 law itself does not require the landowner to sign or cosign a permit application. It follows that the district is not legally obligated to make sure that an applicant has the owner's permission to start work on a project. While the district is not legally obligated to obtain a landowner's signature on a SB 310 application, the district does have the discretion to require it when it seems useful.

54. Q2: Does the 310 permit authorize a project without the landowner's approval?

A2: Obtaining authorization and access from the owner is solely the responsibility of the applicant. District approval of a project should not be construed as giving the applicant the right of access to the project site.

## RIGHTS OF THE PUBLIC — ACCESS TO RECORDS, NOTICE, AND PARTICIPATION

15. Q: Are 310 applications open to public inspection?

A: Conservation districts are political subdivisions of the state (76-15-103(4), MCA). Documents in conservation district possession, such as applications received under the 310 law, are public documents (2-6-201, MCA, and 2-6-202, MCA). Therefore, a conservation district must allow public inspection of its files of applications received under the Natural Streambed and Land Preservation Act of 1975.

18. Q2: Does the CD need to give public notice and allow public participation in CD meetings?

A2: The board of supervisors of a conservation district must provide notice to the public, and allow public participation in any meeting held to discuss and make decisions on proposed projects to alter streambeds, if such proposals are of "significant public interest."

19. Q: Can the CD publicly disclose the name, address, and telephone numbers on a 310 violation form?

A: Nondisclosure is appropriate only if the district: (1) determines that a matter of privacy is involved, (2) weighs the demands of that privacy and the merits of publicly disclosing the information, and (3) finds that the demand of individual privacy clearly outweighs the demand of public disclosure. All requests for violation form records must be in writing and be specific. Any grants or denials of access by the district must also be in writing and specifically state the reasons therefor.

26. Q4: What are the public's rights of access to violation complaints?

A4: The 310 law does not require that an individual providing information as to a violation of the law disclose his identity. If the conservation district does not want to put itself in the position of having to balance the "public right to know" and the "protection of individual privacy" provisions of the Montana Constitution, the conservation district should not require persons providing information to furnish their names or identities. A person voluntarily providing his or her identity waives the right to privacy, and the district should have no problem in allowing such information to be open to public inspection.

31. Q: Can a conservation district change its 310 rules to require surety bonds?

A: Any rule change must be adopted according to 75-7-117, MCA, by resolution "only after a public hearing." Notice of the rule change should be given at least 30 days in advance of the meeting, in the form of two paid notices in a paper of general circulation in the district. The meeting should provide an opportunity for discussion before the actual change or amendment.

Any surety bond would have to be conditioned on proper reclamation of the project and conformance with any conditions placed on the permit by the supervisors.



# OTHER QUESTIONS

1. Q2: Can a CD adopt a rule that adds the word *knowingly* before the word *violates* in Section 75-7-124, MCA?  
A2: A conservation district cannot adopt a rule that provides that a violation of the act does not occur unless a person or entity *knowingly* violates the act, since that would be in effect changing the law. Such a rule would limit the coverage of the act as to violations.
4. Q: Are holidays, Saturdays, and Sundays excluded from the days of computation required for notice?  
A: Saturday is not a legal holiday in Montana, and, therefore, Saturday is always countable. Whenever the last day of a computation period falls on a holiday, the holiday is excluded, and the following day becomes the final computation day. Sunday is a legal holiday in Montana. Consequently, if the last day of computation is a Sunday, it is excluded, and Monday becomes the last day for computation purposes.

Here is an example showing how to apply this explanation.

Notice of a proposed project is mailed by a rancher on Monday. The notice is received by the supervisors on Wednesday. (Note: generally CDs count their meeting date as the date received.) The computation period (five days) is as follows. Exclude Wednesday, and start computation with Thursday as the first day; Friday, the second day; Saturday, the third day; Sunday, the fourth day; and Monday as the final day. Therefore, the supervisors must have examined the notice and made their determination as to whether the proposed activity is a project on or by Monday.

The following pertinent time requirements are set forth in Section 75-7-112, MCA.

1. The supervisors shall examine notice of proposed project and send a copy of their determination to DFWP and the applicant within five (5) days of receipt of notice.
2. DFWP shall notify the supervisors whether it requests an on-site inspection within five (5) days of receipt of a determination that a proposal is for a project.
3. The supervisors shall call together an inspection team within twenty (20) days of receipt of a request for an on-site inspection. (A member of the team has five (5) days after receipt of such notice to waive participation in the inspection.)
4. Each team member shall make a written recommendation to the supervisors within fifty (50) days of the date of the application.
5. Supervisors shall make their decision and notify the applicant and team members within sixty (60) days of the date of the application.
6. Within five (5) days of receipt of the supervisors' decision, a team member may request that an arbitration panel be appointed.
7. The applicant has fifteen (15) days within which to notify the supervisors if he or she wishes to proceed with the supervisors' recommendation or alternative plan. If the supervisors approve the project as proposed, the applicant may proceed with the project ten (10) days after receipt of the decision.
8. Total time extensions may not exceed one (1) year from the date of application; the applicant shall be notified of the initial time extension within sixty (60) days of the date of application.

5. Q: Can a conservation district refuse to administer or enforce the 310 law if it requires an expenditure that would require the conservation district to exceed its statutory levy authority?
- A: Section 1-2-112, MCA, does not authorize conservation districts to refuse to administer the 310 law for the following reasons:
1. Conservation districts are not *local government units* as the term is used in Section 1-2-112, MCA.
  2. The 310 law does not, per se, require the expenditure of additional funds exceeding the statutory levy authority of districts.
  3. The expenditure of additional funds, if any, is incidental to the main purpose of the act.
9. Q: Can a CD condition a project permit by requiring proof of compliance with other state law?
- A: The supervisors should act on all project applications and not delay action on a permit request until all other state permits have been obtained.
16. Q: Can conservation district employees issue an approval of a project plan?
- A: The board of supervisors, not its employees or designees, must approve proposed projects (except in the limited case where an arbitration panel renders a final decision). Supervisors who are not carrying out their responsibilities, or who improperly delegate such responsibilities, may be subject to prosecution.
18. Q1: If an arbitration panel's decision requires modifications or alterations from the original plan, how are costs associated with the modifications or alterations assigned?
- A1: Section 75-7-112, MCA, provides for a final decision to be made by an arbitration panel when any member of the team making the initial recommendation to the supervisors disagrees with the supervisors' final decision on the proposed project.
- Section 75-7-116, MCA, appears to provide for the sharing of costs between the applicant and the public if the arbitration panel's decision requires a modification of the proposed project as approved by the board of supervisors. There appear to have been no cases yet in which this section of the 310 law has been applied.
20. Q: Is the decision of an arbitration panel final?
- A: The conservation district may not modify or reject the decision of the arbitration panel, but may appeal the decision to district court within 30 days of the final written report of the arbitration panel.
24. Q: Who has ownership of the stream channels and responsibility for bank stabilization?
- A: The State of Montana owns the streambeds of navigable lakes or streams, below the low-water level. Where the body of water is not navigable, the owner of land bounded by that body owns the bed to the midpoint. Many larger creeks would come within the definition of *navigable*.
- There is no theory under which the State of Montana would be responsible for stabilizing the banks of a stream. Even an adjacent landowner is not responsible for stabilizing the banks of a stream, even though it may be to his advantage to do so in order that his land does not wash away.



27. Q: What constitutes a *310 permit*?
- A: The *310 permit* is not a permit per se; rather, it is a decision of the supervisors approving or modifying a plan to physically alter a stream. The process established by the legislature requires that the entire record of decision be used in defining the definitive plan to be implemented. The record of decision would include the application, operational plan, board action, etc.
29. Q: Can a conservation district require a surety bond for placer mining activity?
- A: The 310 law has the broad general goal of allowing conservation districts to do whatever is necessary, within the guidelines set by the Board of Natural Resources and Conservation, to protect natural streams and rivers and adjacent property, and the requirement of a surety bond from those seeking a 310 permit would serve that goal and be within a district's powers. Such a requirement should be included in a conservation district's rules, however.
34. Q: How does the 310 law apply to the removal of beaver dams?
- A: Beaver dams may be excluded from the 310 law by Rule 11 in situations where the beaver dams are endangering the public health (87-1-224, MCA) or interfering with water rights (75-7-104, MCA). Removal of debris interfering with water rights is not considered a project, but beaver dams are not debris unless they interfere with a structure, and therefore are not automatically excluded. Anyone planning to engage in a project (i.e., remove a beaver dam) is required to give proper notice to the supervisors.
35. Q: Can a 310 permit be authorized for a period as long as five years?
- A: The 310 law does not specify a time limit for completing a project, but there are some conditions the board may wish to consider and include if they do issue a permit for an extended period of years. First, the permit should be revocable at any time the project is not being carried out as approved. Second, the board should have the power to review the project at any time. Third, the applicant should notify the board prior to the commencement of the annual work and upon completion.
38. Q: Is it legal for the county to delegate floodplain management permit duties to the CD, and can the CD assume this responsibility?
- A: The conservation district may rightfully assume the administration of floodplain management within the banks of the stream. The single permitting process should provide an efficient review of the project. However, the conservation district will assume greater responsibility in meeting the stringent requirements of floodplain administration.
41. Q: What is a district's liability under the 310 law?
- A: Liability may arise in the conservation district, and perhaps the supervisors themselves, from non-action in regard to the mandatory duties imposed by the 310 law. However, once the board acts on the permit (if done within the scope of official authority and without willfulness, maliciousness, or gross negligence), the quasi-judicial nature of the permitting process shields the district and the supervisors from liability.
47. Q: Can tires be used as riprap?
- A: It appears that tires can be used for bank stabilization under certain circumstances if approved by the board of supervisors; however, DNRC and DFWP believe other materials would be more suitable.

59. Q: What constitutes a conflict of interest?
- A: The supervisor should abstain when voting would result in his or her economic benefit, and do so “directly” and “substantially.” In each case, in deciding whether to disqualify themselves, supervisors will have to use their best judgment as to whether their economic interests are tainting their vote.
68. Q: Can 310 permits be issued without the participation of the Department of Fish, Wildlife and Parks?
- A: The 310 permitting process requires DFWP notification and participation. Permits issued without DFWP participation are void, and conservation district supervisors could be subject to civil and criminal liability and removal from office.
69. Q: Are environmental reviews required of projects governed by the 310 law?
- A: The Montana Environmental Policy Act (MEPA) is limited to the actions of state agencies. Until such time as MEPA is amended to include political subdivisions, local governmental entities like conservation districts are not required to follow the environmental review criteria that state agencies follow in permitting development.
75. Q: Should secondary impacts to the stream be a consideration in issuing a 310 permit?
- A: In the situation where a boat dock is being constructed under the 310 law, the local conservation district has no legal obligation to consider the impacts on the stream from the potential commercial use of the dock. For example, the potential impacts that may occur from the operation of boats using a dock are not impacts that are to be considered in the determination of whether the conservation district should grant or deny a 310 permit for the construction of the dock.



# APPENDIX A

## CHRONOLOGICAL LIST OF OPINIONS

This appendix presents information on the origin of each opinion — person or conservation district that requested it, person who wrote it (and his or her organization), and date it was written. In most cases, the author is a lawyer or legal intern. In a few, the opinion was written instead by another knowledgeable source, such as the regional forester, the state lands commissioner, or the administrator of DNRC's Conservation and Resource Development Division.

Opinion Number	Date Issued	Requester	Author
1	January 6, 1976	Flathead CD	Ted Doney, DNRC
2	January 8, 1976	Ole Ueland, DNRC	Ted Doney, DNRC
3	February 17, 1976	Ole Ueland, DNRC	Ted Doney, DNRC
4	February 26, 1976	Ole Ueland, DNRC	Don MacIntyre, DNRC
5	April 19, 1976	Sweet Grass County CD	Ted Doney, DNRC
6	May 11, 1976	Gareth Moon, DNRC	Ted Doney, DNRC
7	May 26, 1976	Power River CD	Ted Doney, DNRC
8	April 14, 1977	Valley County CD, Green Mountain CD	Mike Greely, Attorney General (37 Op. Att'y Gen. 15)
9	August 15, 1977	Parham Hacker, DNRC	Don MacIntyre, DNRC
10	February 6, 1978	Ole Ueland, DNRC	Robert Phillips, DNRC
11	July 14, 1978	Mineral CD	Gary Spaeth, DNRC
12	June 21, 1979	Lewis and Clark County CD	Gary Hausken, Lewis and Clark County Attorney
13	Omitted		
14	August 9, 1979	Ole Ueland, DNRC	Cary Lund, DNRC
15	October 5, 1979	Parham Hacker, DNRC	Richard Gordon, DNRC
16	November 28, 1979	Ole Ueland, DNRC	Don MacIntyre, DNRC
17	Omitted		
18	July 2, 1980	Don MacIntyre, DNRC	Stephen Pohl, DNRC
19	July 21, 1980	Ole Ueland, DNRC	Brian Holland, DNRC
20	January 15, 1981	Ole Ueland, DNRC	Don MacIntyre, DNRC
21	January 16, 1981	Ole Ueland, DNRC	Gary Spaeth, DNRC
22	March 10, 1981	Flathead CD	Gary Spaeth, DNRC

Opinion Number	Date Issued	Requester	Author
23	April 8, 1981	Terry Wheeler, DNRC	Gary Spaeth, DNRC
24	July 16, 1981	Ray Beck, DNRC	Gary Spaeth, DNRC
25	July 16, 1981	Ray Beck, DNRC	Gary Spaeth, DNRC
26	April 21, 1982	Cascade County CD	Don MacIntyre, DNRC
27	June 1983	Jefferson Valley CD	Don MacIntyre, DNRC
28	October 21, 1983	Ray Beck, DNRC	Don MacIntyre, DNRC
29	November 29, 1983	Ray Beck, DNRC	Tim Hall, DNRC
30	February 9, 1984	Ray Beck, DNRC	Tim Hall, DNRC
31	March 21, 1984	Ray Beck, DNRC	Tim Hall, DNRC
32	April 3, 1984	Ray Beck, DNRC	Don MacIntyre, DNRC
33	May 16, 1984	Yellowstone CD	Matt Williams, DNRC
34	November 23, 1984	Lincoln CD	Candace West, DNRC
35	December 17, 1984	Yellowstone CD	Robert Throssell, DNRC
36	January 9, 1985	Ray Beck, DNRC	Dennis Hemmer, State Lands Commissioner, DSL
37	March 11, 1985	Flathead CD	Candace West, DNRC
38	April 16, 1985	Lincoln CD	Candace West, DNRC
39	May 29, 1985	Ray Beck, DNRC	Don MacIntyre, DNRC
40	August 12, 1985	Ray Beck, DNRC	Faye McKnight, DNRC
41	August 12, 1985	Ray Beck, DNRC	Faye McKnight, DNRC
42	October 23, 1985	Ray Beck, DNRC	James Madden, DNRC
43	October 28, 1985	Ray Beck, DNRC	James Madden, DNRC
44	December 10, 1985	Ray Beck, DNRC	Tim Hall, DNRC
45	Omitted		
46	February 20, 1986	Lake County CD	Jim Madden, DNRC
47	April 25, 1986	Missoula County CD	Ray Beck, DNRC
48	May 19, 1986	Ted Mizner Powell County Attorney	Mike Greely, Attorney General (41 Op. Att'y Gen. 62)
49	December 5, 1986	Debi Brammer Executive Secretary, MACD	James Overbay, Regional Forester, USFS

Opinion Number	Date Issued	Requester	Author
50	January 4, 1987	Flathead CD	Jim Madden, DNRC
51	March 18, 1987	Lincoln CD	Candace West, DNRC
52	September 22, 1987	Ray Beck, DNRC	Don MacIntyre, DNRC
53	December 2, 1987	Ray Beck, DNRC	Don MacIntyre, DNRC
54	July 20, 1988	Cascade County CD	Jim Madden, DNRC
55	August 15, 1988	Jim Nugent Missoula County Attorney	Mike Greely, Attorney General (42 Op. Att'y Gen. 106)
56	October 6, 1988	Flathead CD	Jim Madden, DNRC
57	October 28, 1988	Ray Beck, DNRC	Don MacIntyre, DNRC
58	January 15, 1989	Ray Beck, DNRC	Faye Bergan, DNRC
59	January 24, 1989	Mineral CD	Don MacIntyre, DNRC
60	February 12, 1989	Flathead CD	Don MacIntyre, DNRC
61	Omitted		
62	September 12, 1989	Lewis and Clark County CD	Ray Beck, Administrator DNRC Conservation and Resource Development Division
63	February 27, 1990	Deer Lodge Valley CD	Don MacIntyre, DNRC
64	February 27, 1990	Ray Beck, DNRC	Don MacIntyre, DNRC
65	Omitted		
66	Omitted		
67	June 28, 1990	Ray Beck, DNRC	Don MacIntyre, DNRC
68	September 11, 1990	Ray Beck, DNRC	Fred Robinson, DNRC
69	October 15, 1990	Ray Beck, DNRC	Don MacIntyre, DNRC
70	January 15, 1991	Meagher County CD	Don MacIntyre, DNRC
71	February 5, 1991	Lincoln CD	Don MacIntyre, DNRC
72	March 4, 1991	Teton County CD	Fred Robinson, DNRC
73	July 17, 1991	Gallatin CD	Faye Bergan, DNRC
74	July 18, 1991	Ray Beck, DNRC	Tim Hall, DNRC
75	April 20, 1992	Flathead CD	Ray Beck, Administrator DNRC Conservation and Resource Development Division





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Following is a list of the specific subjects addressed in the legal opinions. The subjects are listed in alphabetical order. The first number immediately after each subject refers to the number of the legal opinion, while the number in parentheses is that of the page where the opinion can be found. Often the same subject comes up in more than one opinion.

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